83-462

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STURM, RUGER & CO., INC.,

Petitioner,

v.

TIM A. ZAHRTE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May the United States Court of Appeals for the Ninth Circuit substantially depart from the accepted and usual course of judicial proceedings by ignoring its long-established standard of review and reversing a district court's interpretation of state law which was not clearly wrong?

2. May the United States Court of Appeals for the Ninth Circuit substantially depart from the accepted and usual course of judicial proceedings by certifying to the Montana Supreme Court a question of state law as to which there was no uncertainty, when certification would undermine federal diversity jurisdiction and result in wasted judicial effort and undue expense to the litigants?

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v.

TIM A. ZAHRTE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS OF COURTS BELOW

This petition arises out of a June 21, 1983 opinion of the United States Court of Appeals for the Ninth Circuit which is reported at 709 F. 2d 26 (9th Cir. 1983). Also referred to herein is the unreported May 18, 1982 order of the United States Court of Appeals for the Ninth Circuit certifying two questions to the Montana Supreme Court, pursuant to Rule I of the Rules of the Montana Supreme Court; a March 3, 1983 opinion of the Montana Supreme Court, reported at 40 Mont. ____, 661 P. 2d 17 (1983); an unreported April 14, 1983 per curiam order of the Montana Supreme Court modifying its March 3, 1983 order; and an August 22, 1980 opinion of the United States District Court for the District of Montana, Butte Division, published at 498 F. Supp. 389 (D. Mont. 1980). All of these opinions and orders have been reproduced in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit entered June 21, 1983. The Court has jurisdiction over this petition pursuant to Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Rule I Of The Rules Of The Montana Supreme Court

All rules with respect to the operation of this Court, procedure and practice therein, are contained in the Montana Rules of Appellate Civil Procedure, except that whenever in an action pending in a United States court, it shall appear that there is a controlling question of Montana law, as to which there is a substantial ground for difference of opinion, a party to such action may institute suit in the Montana Supreme Court for a declaratory judgment or decree, and, if the judge of the United States court wherever the action is pending shall certify that the question upon which adjudication is sought is controlling in the federal litigation and the adjudication by the Montana Supreme Court will materially advance ultimate termination of the federal litigation, a declaratory judgment or decree may be rendered.

Rendition of a declaratory judgment or decree is discretionary with the Montana Supreme Court, and it may refuse to render such a judgment or decree if it appears that there is another ground for determination of the case pending in the United States court or if the question for adjudication is not clearly defined or if the question is not adequately briefed or argued. Mont. Sup. Ct. R. I.

STATEMENT OF THE CASE

This product liability action arises out of a Complaint filed by Respondent, Tim A. Zahrte, to recover for injuries sustained when a revolver, manufactured by Petitioner, Sturm, Ruger & Co., Inc., accidentally discharged. The case was filed in the United States District Court for the District of Montana, Butte Division. Jurisdiction was premised upon diversity of citizenship. After three weeks of trial in May of 1980 before Judge William D. Murray, the jury returned a verdict in favor of Sturm, Ruger. A special verdict form reflected the jury's finding that Zahrte assumed the risk of his injury.

Zahrte moved for a new trial and for judgment notwithstanding the verdict, asserting, *inter alia*, that the district court erred in instructing the jury that assumption of risk was a complete bar defense rather than merely a damage reducing factor. On August 22, 1980, Judge Murray denied Zahrte's motions, holding that assumption of risk "is a firmly established defense in a products liability action in Montana." *Zahrte* v. *Sturm, Ruger & Co.*, 498 F. Supp. 389, 392-93 (D. Mont. 1980). (App. 18a).

Following denial of his post-trial motions, Zahrte appealed to the United States Court of Appeals for the Ninth Circuit, asserting again that the district court's assumption of risk instruction was erroneous. Although Zahrte conceded on appeal that assumption of risk was a complete bar defense under Montana law as it existed at the time of trial, he claimed that the district court erred by not following the "modern trend" and apportioning assumption of risk under comparative fault principles. On May 18, 1982, after briefing and oral argument had been completed, the Ninth Circuit certified two questions to the Montana Supreme Court pursuant to Rule I of the Rules of the Montana Supreme Court. (App. 5a) One of the questions certified for review was as follows:

> (1) Does the defense of assumption of risk still exist as a complete bar to plaintiff's recovery in a products liability action in the State of Montana?

There is room for substantial difference of opinion as to the correct answer to this question. *See, Brown* v. *North American Mfg. Co.*, 576 P. 2d 711 (Mont. 1978); *Kopischke* v. *First Continental Corp.*, 610 P. 2d 668 (Mont. 1980); *Zahrte* v. *Sturm, Ruger & Co.*, 498 F. Supp. 389 (D. Mont. 1980); *Trust Corp. of Montana* v. *Piper Aircraft Corp.*, 506 F. Supp. 1093 (D. Mont. 1981); *Ingram* v. *Dick-Char, Inc.*, No. 80-107-M (D. Mont. January 7, 1982).

The parties submitted briefs to the Montana Supreme Court addressing the certified questions. Oral argument was heard. On March 3, 1983, almost three years after trial, the Montana Supreme Court rendered its opinion on the assumption of risk question. (App. 8a). That opinion announced that while assumption of risk had been a complete bar defense both at the time of trial and at the time of certification, henceforth if the defense of assumption of risk was found to exist, "then plaintiff's conduct must be compared with that of defendant. The same Montana law which governs comparison of contributory negligence controls comparison of assumption of risk." (App. 12a)[1] Justice Gulbrandson dissented, claiming that the court "has used the certification process to announce a change in the law, without guidance to the federal court as to when that change occurred." (App. 13a). On April 14, 1983, the Montana Supreme Court modified its earlier opinion in a manner not relevant for purposes of this petition. (App. 16a)

After the Montana Supreme Court had ruled, the Ninth Circuit ordered the parties to file supplemental briefs addressing the effect of the Montana Supreme Court opinion on the appeal. The case was resubmitted on June 1, 1983. On June

[1] Under the Montana Comparative Negligence Statute, contributory negligence does not bar recovery if such negligence was not greater than the negligence of the person against whom recovery was sought, but any damages allowed are diminished in proportion to the amount of negligence attributable to the person recovering. Mont. Rev. Code Ann. § 27-1-702 (1979).

21, 1983, more than three years after trial and more than thirteen months following certification, the Ninth Circuit vacated the judgment and remanded the case to the district court for a new trial. (App. 1a). This action was premised upon the court's finding that "the district court's instruction on assumption of risk, instructing that if the jury found that plaintiff assumed the risk he could not recover, was contrary to Montana law." (App. 3a). The instant petition followed.

REASONS FOR GRANTING THE WRIT

A. Summary

A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is sought to rectify a substantial departure by that court from the long established and clearly defined standard for reviewing a district court's interpretation of state law. In addition, this case presents compelling reasons to review the Ninth Circuit's undisciplined use of Montana's interjurisdictional certification procedure.

This case presents the appropriate facts for this Court to clarify the standards under which a federal court appropriately may utilize state certification procedures. Twenty-five states presently have such procedures.[2] Although certification is in-

[2] Ala. Const., art. 6 § 6.02(b); Ala. R. App. p. 18; Colo. App. R. 21.1; Fla. Stat. Ann. § 25.031; Fla. App. R. 9.150; Ga. Code Ann. § 24-3902; Ga. Sup. Ct. R. 36; Hawaii Rev. Stat. § 602-5(2); Hawaii Sup. Ct. R. 20; Idaho App. R. 12.1; Ind. Code Ann. § 33-2-4-1; Ind. App. R. 15(o); Iowa Code Ann. §§ 684A.1-A.8; Kan. Stat. Ann. §§ 60-3201-12; La. Rev. Stat. Ann. § 13-72.1; La. Sup. Ct. R. 12; Me. Rev. Stat. Ann. tit. 4, § 57; Me. R. Civ. P. 76B; Mass. Sup. Jud. Ct. R. 3.2; Mich. Gen. Ct. R. 797.2; Minn. Stat. Ann. § 480.061; Miss. Sup. Ct. R. 46; Mont. Sup. Ct. R. 1; N.H. Rev. Stat. Ann. § 490; N.H. Sup. Ct. R. 21; N.M. Stat. Ann. § 34-2-8; N.D. R. App. P. 47; Okla. Stat. Ann. tit. 20, §§ 1601-12; P.R. R. Civ. P. 53.1(c); R.I. Sup. Ct. R. 6; Wash. Rev. Code Ann. § 2.60.010-.900; Wash. R. App. P. 16.16; W. Va. Code § 51-1A-1-12; Wis. Stat. Ann. § 821; Wyo. Stat. §§ 1.193.1-4.

voked by federal courts more routinely every day, those courts, including the Ninth Circuit, have had little to say about how and when certification should be employed. The case at bar is a prime example of how certification can function to the detriment of the judicial system and the parties, by not confining its application to unresolved questions of state law. In order to restrain federal courts from certifying well settled but troubling questions of state law which arise under diversity jurisdiction and from improperly using certification to change that law, this Court should establish guidelines for the employment of state certification procedures. The Court has not addressed the discretion of federal courts in using state certification procedures since *Lehman Brothers* v. *Schein*, 416 U. S. 386 (1974). The expansion of certification and its attendant abuses warrants renewed consideration.

B. By Failing To Adhere To Its Own Standard Of Review, The Ninth Circuit Departed From The Accepted And Usual Course Of Judicial Proceedings.

Prior to disposition of the instant appeal, it was well settled in the Ninth Circuit that a district court's interpretation of state law will not be disturbed unless clearly wrong. Indeed, this standard of review was affirmed no fewer than five times in 1982 alone. *Airlift International, Inc.* v. *McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982); *Walgreen Arizona Drug Co.* v. *Levitt*, 670 F.2d 860, 863 (9th Cir. 1982); *Feldman* v. *Simkins Industries, Inc.*, 679 F.2d 1299, 1306 (9th Cir. 1982); *Brackney* v. *Combustion Engineering, Inc.*, 674 F.2d 812, 815 (9th Cir. 1982); *Camacho* v. *Civil Service Commission*, 666 F.2d 1257, 1262 (9th Cir. 1982).

In the case at bar, however, the Ninth Circuit defied its own clear mandate. Rather than following its professed standard of review, the court refused to affirm an interpretation of state law which the court already had determined was not clearly wrong. The Ninth Circuit certified the assumption of

risk question to the Montana Supreme Court because it perceived "substantial ground for difference of opinion" on that issue. (App. 5a). Yet the decision to certify and the court's subsequent reversal of the district court's interpretation of state law are irreconcilable. The very fact that the purported uncertainty in Montana law created a basis for difference of opinion indicates that the district court's interpretation was not clearly wrong. Were it clearly wrong, the Ninth Circuit would have reversed and remanded immediately without invoking Montana's costly and time consuming certification procedure. Indeed, only the reasonableness of the district court's interpretation made certification a viable alternative. If the district court had been clearly wrong, the "substantial ground for difference of opinion" required to support application of the certification procedure would have been lacking. Thus, once the Ninth Circuit certified the assumption of risk question to the Montana Supreme Court, it tacitly acknowledged that the district court's interpretation of state law was not clearly wrong and should have been affirmed.

At least one Ninth Circuit judge has admitted that the court ignores its articulated and mandated standard of review. In his specially concurring opinion in *Shekell* v. *Sturm, Ruger & Co., Inc.*, No. 81-3616 (9th Cir. August 16, 1983), Justice Poole expressly repudiated the "clearly wrong" test:

> I do not doubt that many of our cases assert the existence of such a "clearly wrong" standard, but I strongly doubt that it exists, or that, as articulated, it is followed, or is other than subjectively applied, or is capable of being applied.
>
> . . .
>
> . . . I believe it is fanciful to obscure by a meaningless formula the truth that we review *de novo* determinations of law.

(App. 39a-40a). It is unsettling to Petitioner, and presumably to all other litigants as well, that the Ninth Circuit professes to adhere to a standard of review which, in the words of Justice Poole, either does not exist or has become "a meaningless

formula." (*Id.*). The Ninth Circuit's reversal of the district court's interpretation of state law after its previous determination that the issue in question created substantial ground for difference of opinion evidences the confusion and inconsistency which prevail in the Ninth Circuit as a result of its failure to abide by its own standard of review.

By failing to adhere to the standard of review which it holds out to litigants and upon which litigants justifiably have come to rely, the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. The Ninth Circuit's Use Of Certification Constituted An Obvious Departure From The Usual And Accepted Application Of That Judicial Procedure.

The Ninth Circuit's novel and unprecedented use of certification to avoid applying existing law subverts the legitimate application of the certification procedure and appellate review in general. There was no uncertainty at the time of certification regarding the status of assumption of risk in strict liability cases. The district court had no difficulty discerning the controlling state law. As Judge Murray stated in his opinion denying Zahrte's post-trial motions:

> Because assumption of risk is a firmly established defense in a products liability action in Montana, *Brown v. North American Mfg. Co., supra,* it was only plaintiff's conduct falling short of assumption of risk which could be considered in applying the comparative fault principles . . .

Zahrte v. *Sturm, Ruger & Co.*, 498 F. Supp. 389, 392-93 (D. Mont. 1980). (App. 23a). Even Zahrte, appellant below, acknowledged that under *Brown* v. *North American Mfg. Co.*, 176 Mont. 98, 576 P.2d 711 (1978), assumption of risk was a complete bar defense in strict liability actions. In his brief to the Montana Supreme Court following certification, Zahrte

conceded that existing state law, as articulated in *Brown*, was consistent with Sturm, Ruger's position on this critical issue. Zahrte stated:

> This court in *Brown v. North American Mfg. Co.*, 576 P.2d 711, implicitly approved of the "all or nothing" relationship of assumption of risk to strict products liability.

(Brief at 15). Having acknowledged that *Brown* was the controlling decision, Zahrte concluded:

> As indicated above, Montana's position seems clear: strict liability as envisioned by Section 402A of the Restatement, has been adopted with the subjective evaluation of the plaintiff's conduct being a complete bar at present.

(Brief at 18). The Ninth Circuit disregarded this unanimity of opinion in certifying the assumption of risk question to the Montana Supreme Court. By fabricating uncertainty where none in fact existed, the Ninth Circuit invited the Montana Supreme Court to announce a retrospective change in existing law, rather than to resolve a legitimate difference of opinion. This action constituted a clear abuse of the certification procedure.[3]

The purpose of certification is to ascertain what the applicable state law is, not to change it. *See, e.g., Tarr* v. *Manchester Insurance Corp.*, 544 F.2d 14, 15 (1st Cir. 1976). A party may not, through certification, "seek to persuade the state court to change what appears to be present law." *Cantwell* v. *University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977). If a party is not permitted to use certification for this purpose, surely an appellate court should be proscribed from utilizing certification for this illegitimate objective.

Unbridled use of certification under the circumstances present here would emasculate federal diversity jurisdiction.

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[3] The Montana Supreme Court accepted the Ninth Circuit's invitation to change the law. As Justice Gulbrandson stated in his dissent from the Montana Supreme Court majority opinion: "In my view, the majority has used the certification process to announce a change in the law, without guidance to the federal court as to when that change occurred." (App. 13a).

Judge Murray was sitting in the very state whose law he was asked to apply.[4] The parties concur that his decision was proper under state law as it existed at the time. If certification is appropriate under these circumstances, the federal judge in diversity cases would be rendered superfluous. Every time an arguably difficult interpretation of state law arose, the court could remit the matter to the state court pursuant to certification. Such action, which the instant decision of the Ninth Circuit foreshadows, would be contrary to the admonition stated by this court in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234 (1943) that mere difficulties in forecasting the state court's ultimate position "do not in themselves" justify abdication of diversity jurisdiction.

Conservation of judicial effort is not fostered when the procedure is utilized as it has been here. In *Lehman Brothers* v. *Schein*, 416 U. S. 386 (1974), this Court addressed for the first time the discretion of courts of appeals in certifying questions of state law. In a concurring opinion, Justice Rehnquist expressed grave reservations as to whether certification would promote judicial economy and conservation of resources in all cases:

> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by federal courts.

416 U. S. at 394. There may be no better example of the delay and expense envisioned by Justice Rehnquist than the case at bar. The case was submitted by Judge Murray to the jury after three weeks of trial. Upon appeal, after briefs had been filed in

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[4] This Court acknowledged in *Lehman Bros.* v. *Schein*, 416 U. S. 386 (1974), that the location of the federal judge attempting to interpret state law is an important consideration in determining whether resort to certification was appropriate. Judge Murray, sitting in Montana, was no "outsider," lacking the common exposure to local law which comes from sitting in the jurisdiction. 416 U. S. at 394-96.

the Ninth Circuit and oral argument had been heard, the court certified the assumption of risk question to the Montana Supreme Court. Briefs then were submitted to that tribunal and oral argument was heard. Following termination of proceedings in the Montana Supreme Court, the parties were ordered by the Ninth Circuit to file supplemental briefs addressing the effect of the Montana Supreme Court opinion on the instant appeal. The decision of the Ninth Circuit was not handed down until June 21, 1983, almost three years after the appeal was initiated and more than thirteen months after the certification procedure was invoked. The costs associated with proceeding in the Montana Supreme Court and filing a supplemental brief in the Ninth Circuit equaled or exceeded the expenses incurred prior to certification, to say nothing of the time and energy expended by those already overburdened courts in reconsidering and redeciding this matter. If the objective of certification is to materially advance ultimate termination of the federal litigation and conserve time, energy, and resources, that objective was not accomplished by the Ninth Circuit's injudicious use of certification in the case at bar. Rather, the litigants have been forced to travel the long, expensive road to finality which Justice Douglas cautioned against in *Clay* v. *Sun Insurance Office, Ltd.*, 363 U. S. 207, 228 (1960) (Douglas, J., dissenting):

> Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation.

The federal courts are sorely in need of guidance from this Court as to the scope of certification in the non-abstention context. If federal diversity jurisdiction is to retain any vitality, and if judicial economy and expense to the litigants are legitimate concerns, employment of certification under the circumstances presented herein must be restrained.

CONCLUSION

For all of the foregoing reasons, Petitioner, Sturm, Ruger & Co., Inc., prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and accept this case for review.

Respectfully submitted,

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APPENDIX

Filed June 21, 1983
Phillip B. Winberry
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Tim A. Zahrte,
Appellant,

v.

Sturm Ruger & Company, Inc.,
Appellee.

NO. 80-3400
DC NO. CV 78-19-BU
OPINION

Appeal from the United States District Court
District of Montana, Butte Division
William D. Murray, District Judge Presiding

Argued and Submitted: December 8, 1981
Resubmitted: June 1, 1983

Before: KILKENNY, GOODWIN and SKOPIL,
Circuit Judges.

KILKENNY, Circuit Judge:

On June 30, 1977, appellant suffered a gunshot wound to his right thumb when his old style single-action revolver accidentally discharged. He brought a products liability diversity action in federal court against the manufacturer/appellee Sturm, Ruger & Co., Inc. Appellant attempted to recover on the theory of strict liability. The case was tried to a jury, which returned a special verdict in favor of appellee. The special verdict form reflected the jury's determination that, under the law as given to it by the trial judge, appellant had assumed the risk of his injury.

FACTS

Appellant purchased the revolver from a stranger in a saloon for $70.00. It was a used revolver, and it was not in its original box. The precise date of manufacture is unknown

because appellant ground off the serial number shortly after the purchase. The seller included no instructions as to the weapon's use. Appellee's name and address were present on the barrel, but appellant did not attempt to obtain any information from it concerning the gun. At the time of the purchase, appellant understood that the revolver was a "Gun of the West", that is, a single-action firearm modeled after revolvers used in the nineteenth century.

Appellant kept the fully loaded revolver on the floor of his service truck as a means of protection against rattlesnakes. The truck was frequently driven over dirt roads, gravel roads, and open terrain. On June 30, 1977, appellant decided to remove some of his personal belongings from the service truck. He transferred these belongings, including the revolver, into another service truck and drove to his residence. However, after removing the belongings from the truck toward his house, he dropped or tossed the revolver onto the steps, causing it to discharge and injure him. The remaining facts and proceedings in the district court are more fully developed in the exhaustive opinion of that court in *Zahrte v. Sturm, Ruger & Co., Inc.*, 498 F. Supp. 389 (D. Mont. 1980).

PROCEDURAL BACKGROUND

The appeal was initially argued and submitted to us on December 8, 1981. Appellant presented several issues. Among these was whether the district court erred in its instructions to the jury concerning the defense of assumption of risk and the doctrine of comparable fault. Finding considerable uncertainty concerning the proper interpretation of Montana law, we certified two questions of state law to the Montana Supreme Court for adjudication, pursuant to Montana Supreme Court Rule I.

The Montana Supreme Court accepted jurisdiction and, after hearing arguments from the parties, rendered its decision in *Zahrte v. Sturm, Ruger & Co., Inc.*, 40 Mont. ____, 661 P.2d 17 (1983). The court found that the following question was dispositive:

> "Does the defense of assumption of risk still exist as a complete bar to plaintiff's recovery in a products liability action in the State of Montana?"

The court held that assumption of risk is an available defense in products liability actions. However, a finding that the plaintiff assumed the risk does not necessarily bar recovery. The court stated that for the defense of assumption of risk to apply

> [p]laintiff must have a subjective knowledge of the danger and then voluntarily and unreasonably expose himself to that danger.... If those elements are found to exist the defense becomes operative and must be *compared* with the conduct of the defendant. The mechanics of comparison are the same as in comparison for contributory negligence.

40 Mont. ____, 661 P.2d at 18-19. [Emphasis supplied].

On June 1, 1983, we ordered that the case be resubmitted for our consideration in light of the decision.

DISCUSSION

After a full and complete consideration of the Montana Supreme Court decision in *Zahrte, supra,* we have concluded that the district court's instruction on assumption of risk, instructing that if the jury found that plaintiff assumed the risk he could not recover, was contrary to Montana law. Therefore, we must vacate the judgment and remand the case for a new trial in light of that decision.

Inasmuch as there is little likelihood of a recurrence of the other issues presented initially, we find it is unnecessary to address them.

CONCLUSION

The judgment is vacated and the case remanded to the district court for a new trial.

IT IS SO ORDERED.

Filed May 18, 1982
Phillip B. Winberry
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Tim A. Zahrte, *Appellant,* v. Sturm Ruger & Company, Inc., *Appellee.*	NO. 80-3400 Certified Questions from The United States Court of Appeals for The Ninth Circuit

TO: THE SUPREME COURT OF THE STATE OF MONTANA.

The United States Court of Appeals for the Ninth Circuit hereby certifies that, in the above-captioned case, controlling questions of law arise as to which there are substantial grounds for difference of opinion, and that their adjudication by the Montana Supreme Court would materially advance ultimate termination of the federal litigation.

The questions certified arise out of the appeal of a products liability action tried to a jury in the United States District Court for the District of Montana. The jury found that the plaintiff had assumed the risk of his injury and was, therefore, completely barred from recovery.

Because of uncertainty concerning the proper interpretation of Montana law, pursuant to Montana Supreme Court Rule I, we certify the following questions:

(1) Does the defense of assumption of risk still exist as a complete bar to plaintiff's recovery in a products liability action in the State of Montana?

There is room for substantial difference of opinion as to the correct answer to this question. *See, Brown v. North American Mfg. Co.*, 576 P.2d 711 (Mont. 1978); *Kopischke v. First Continental Corp.*, 610 P.2d 668 (Mont. 1980); *Zahrte v.*

Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980); *Trust Corp. of Montana v. Piper Aircraft Corp.*, 506 F. Supp. 1093 (D. Mont. 1981); *Ingram v. Dick-Char, Inc.*, No 80-107-M (D. Mont. January 7, 1982).

(2) If the defense of assumption of risk does still exist as a complete bar to plaintiff's recovery in a products liability action, consider the following instructions:

> (a) You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.
>
> (b) The defendant contends that plaintiff assumed the risk of injury from the danger which the plaintiff contends caused his injury. If you find each of the following propositions, the plaintiff cannot recover:
>
> (1) That a dangerous situation existed.
>
> (2) That the dangerous situation was obvious, or that the plaintiff knew of the dangerous situation.
>
> (3) That the plaintiff voluntarily exposed himself to the danger and was injured thereby.
>
> (c) The fact that a danger is obvious does not prevent finding the product is in a defective condition, unreasonably dangerous to the particular plaintiff. The obvious character of a defect or danger is but a factor to be considered in determining whether the plaintiff in fact assumed the risk.

In light of *Brown v. North American Mfg. Co.*, 576 P.2d 711 (Mont. 1978), does the reference to an "obvious" dangerous situation in instruction (b) create such a flaw that the instructions, when read as a whole, constitute reversible error under the law of the State of Montana?

There is room for substantial difference of opinion as to the correct answer to this question. *See, Brown, supra; Rock Spring Corp. v. Pierre*, 615 P.2d 206, 211 (Mont. 1980).

The plaintiff/appellant in the above-captioned case shall forthwith file in the Supreme Court of Montana a declaratory judgment action raising the questions here posed and shall request the Supreme Court to take jurisdiction under Rule I of the Rules of the Supreme Court. A copy of this certificate shall be attached to the complaint in the declaratory judgment action instituted in the Supreme Court of the State of Montana.

DATED this 13th day of May, 1982.

/s/ JOHN A. KILKENNY
/s/ ALFRED GOODWIN
/s/ OTTO R. SKOPIL, JR.
Circuit Judges, United States Court of Appeals for the Ninth Circuit

No. 82-185

IN THE SUPREME COURT OF THE STATE OF MONTANA

1983

Tim A. Zahrte,
Petitioner,

vs.

Sturm, Ruger & Co., Inc.,
Respondent.

ORIGINAL PROCEEDING:

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Milodragovich, Dale & Dye, Missoula, Montana
M. J. Milodragovich argued, Missoula, Montana

For Respondent:

Poore, Roth, Robischon & Robinson, Butte, Montana
Wildeman, Harrold, Allen & Dixon, Chicago, Illinois
James Dorr argued, Chicago, Illinois

For Amicus Curiae:

Charles A. Smith, Helena, Montana

Submitted: January 11, 1983
Decided: March 3, 1983

Filed: March 3, 1983

/s/ ETHEL M. HARRISON
Clerk

ATTEST: A true copy

ETHEL M. HARRISON
CLERK OF SUPREME COURT
HELENA, MONTANA

Mr. Justice Frank B. Morrison, Jr. delivered the Opinion of the Court.

Petitioner here is the appellant in a federal appeal from a judgment entered by the United States District Court (D. Montana) and reported in Zahrte v. Sturm, Ruger & Company (1980), 498 F.Supp. 389. The appeal was briefed and argued before the United States Court of Appeals, Ninth Circuit, and petitioner was then ordered to submit certified questions from the Court of Appeals to this Court for determination.

Petitioner presents multiple questions for resolution but we find the first question to be dispositive.

The following excerpt is taken from the certification:

"Because of uncertainty concerning the proper interpretation of Montana law, pursuant to Montana Supreme Court Rule I we certify the following questions:

"(1) Does the defense of assumption of risk still exist as a complete bar to plaintiff's recovery in a products liability action in the State of Montana?

"There is room for substantial difference of opinion as to the correct answer to this question. See, Brown v. North American Mfg. Co., 576 P.2d 711 (Mont. 1978); Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980); Zahrte v. Sturm, Ruger & Co., 498 F.Supp. 389 (D. Mont. 1980); Trust Corp. of Montana v. Piper Aircraft Corp., 506 F.Supp. 1093 (D. Mont. 1981); Ingram v. Dick-Char, Inc., No. 80-107-M (D. Mont. January 7, 1982), 39 St.Rep. 96."

The answer is "no". This opinion discusses and analyzes Brown v. North American Mfg. Co. (1978), 176 Mont. 98, 576 P.2d 711, and Kopischke v. First Continental Corp., (1980), ____ Mont. ____, 610 P.2d 668, 37 St.Rep. 437, as cited by the Circuit Court of Appeals in the certification. The last three cases referred to are federal cases and need not be discussed. Since the certification this Court has modified Montana law regarding assumption of the risk in Abernathy v. Eline Oil Field

Services, Inc., (1982), ____ Mont. ____, 650 P.2d 772, 39 St.Rep. 1688. Therefore, our decision in that case must be integrated with an analysis of *Brown* and *Kopischke*.

Brown v. North American Mfg. Co., supra, predated the enactment of comparative negligence in Montana. At the time Brown was tried both contributory negligence and assumption of risk were, in negligence actions, absolute bars to recovery. Plaintiff contended in *Brown* that contributory negligence could not be considered as a defense in a case premised upon strict liability. Brown conceded that assumption of the risk would operate as a complete bar. The jury was instructed that plaintiff could be defeated if he were found to have assumed the risk but the jury was instructed that any lack of due care on the part of the plaintiff was not to be considered. The majority of the court disapproved of the instruction because it injected elements of contributory negligence into a strict liability case but did not find the giving of the instruction to be prejudicial error. The court clearly pointed out in *Brown* that plaintiff was to be judged on the basis of plaintiff's subjective knowledge of the danger and not upon a "reasonable man" standard. The issue of whether assumption of risk was a complete bar was not litigated. Following *Brown* the law in Montana was that assumption of risk was the only affirmative defense in a strict liability case.

In Kopischke v. First Continental Corp. (1980), ____ Mont. ____, 610 P.2d 668, 37 St.Rep. 437, this Court first had an opportunity to address the defense of assumption of risk after the legislature adopted comparative negligence. Although this Court held that none of the elements of assumption of risk were present in *Kopischke*, we held that in the future, in Montana, assumption of risk conduct would be compared just as contributory negligence was compared under the new statute.

Since certification of the issue in this case, we decided Abernathy v. Eline Oil Field Services, Inc., (1982), ____ Mont. ____, 650 P.2d 772, 39 St.Rep. 1688. In *Abernathy* we abolished implied assumption of risk as a defense to negligence actions but reserved decision on the applicability of assumption of risk where the defense was interposed in a strict liability action. Had we completely abolished assumption of risk as a defense in *Abernathy* there would have been no defenses remaining for strict liability cases. We therefore reserved judgment to a later date.

Assumption of the risk involves application of a subjective standard to the plaintiff's conduct. Contributory negligence, on the other hand, involves the application of a "reasonable man" standard which necessarily is objective. Although there is language in Kopischke v. First Continental Corp., supra, quoting from other jurisdictions, which would indicate that assumption of the risk is subsumed in contributory negligence, we feel that, by virtue of the two different standards involved, the concepts are distinct. The thrust of *Kopischke* is to allow assumption of risk to be compared rather than have it operate as an absolute bar. We did not intend in *Kopischke* to merge the two defenses.

In Abernathy v. Eline Oil Field Services, Inc., supra, we maintained a distinction between assumption of risk as a defense in negligence actions and assumption of risk as a defense in a strict liability case. The common law defense of assumption of risk involved the defeat of a plaintiff who voluntarily exposed himself to a known danger. Plaintiff was defeated even if such exposure was done reasonably. In *Abernathy* we resolved to discard this outmoded doctrine but reserved judgment with respect to strict liability actions for two reasons. First, the defense of assumption of risk in a strict liability action is different from common law assumption of risk as applied to negligence actions. Secondly, we felt that a defense should be retained for strict liability actions and that assumption of risk may be the appropriate defense.

Unlike the common law defense of assumption of risk, the defense as applied in a strict liability case involves *unreasonable* exposure to a known danger. Plaintiff must have a subjective knowledge of the danger and then voluntarily and unreasonably expose himself to that danger before assumption of risk will become operative in a strict liability case. If those elements are found to exist the defense becomes operative and must be compared with the conduct of defendant. The mechanics of comparison are the same as in comparison for contributory negligence.

In summary, assumption of risk is an available defense in a strict liability case. The defense must establish that plaintiff voluntarily and unreasonably exposed himself to a known danger. If the defense is found to exist then plaintiff's conduct must be compared with that of defendant. The same Montana law which governs comparison of contributory negligence controls comparison of assumption of risk.

/s/ FRANK B. MORRISON, JR.
Justice

We concur:

/s/ FRANK J. HASWELL
Chief Justice

/s/ JOHN CONWAY HARRISON
/s/ DANIEL J. SHEA
/s/ DANIEL J. WEBER
/s/ JOHN L. SHELBY
Justices

Mr. Justice L. C. Gulbrandson respectfully dissenting:

I respectfully dissent.

The United States Court of Appeals for the Ninth Circuit has requested this Court's answers to certified questions for application in the instant case, tried during May 1980, and in the case of Shekell v. Sturm, Ruger & Company, Inc., in the United States District Court (D. Montana) case no. D.C. CV-80-70-PGH, judgment entered June 10, 1981.

In my view, the majority has used the certification process to announce a change in the law, without guidance to the federal court as to when that change occurred.

In Brown v. North American Mfg. Co. (1978), 176 Mont. 98, 576 P.2d 711, a strict liability case, this Court reiterated assumption of risk as a bar to recovery by setting out 2 Restatement of Torts 2d, § 402A, Comment (n) and stating: "We find the above standard of conduct of the plaintiff as related to the injury must be considered under the Montana case law on the assumption of risk when applied to strict liability cases." 576 P.2d at 719. Under *Brown*, the answer to the first certified question is "yes".

In Kopischke v. First Continental Corp. (1980), ____ Mont. ____, 610 P.2d 668, 37 St.Rep. 437, not a strict liability case, this Court stated:

> "As stated earlier, the elements of the doctrine of assumption of the risk are not present in this case. However, when this situation does arise, we will follow the modern trend and treat assumption of the risk like any other form of contributory negligence and apportion it under the comparative negligence statute." 610 P.2d at 687.

In Abernathy v. Eline Oil Field Services, Inc. (1982), ____ Mont. ____, 650 P.2d 772, 39 St.Rep. 1688, not a strict liability case, this Court held that the doctrine of *implied* assumption of risk is no longer applicable in Montana and further stated: "In

this case, we are not ruling upon the application of the doctrine of assumption of risk in product liability cases." 650 P.2d at 776.

As of that date, the answer to the first certified question would appear to remain "yes".

In *Abernathy*, this Court, in essence, merged the defense of assumption of risk in negligence cases into the general scheme of comparative negligence, following the reasoning that assumption of risk is a variant of contributory negligence, citing Li v. Yellow Cab Co. of California (1975), 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, a case previously cited with approval in *Kopischke*.

The California Supreme Court in Daly v. General Motors Corp. (1978), 144 Cal.Rptr. 380, 575 P.2d 1162, used the *Li* case to extend the principles of comparative negligence to actions founded in strict products liability, thereby joining the majority of states which have considered the issue. Those states have recognized the semantic incongruity of applying negligence concepts to cases in strict liability, but have noted that strict liability does not mean absolute liability, and that by applying comparative negligence or fault principles, the bar to recovery under the assumption of risk defense is removed. See cases cited in Trust Corp. of Montana v. Piper Aircraft Corp. (1981 D.Mont.), 506 F.Supp. 1093, footnote 3.

The signers of the majority opinion, by refusing to apply general comparative principles in strict liability cases, and taking a unique position will surprise those federal judges who have had occasion to interpret Montana law to this date.

Here, the majority, in effect, has refused to extend comparative principles except in the limited area where a plaintiff has voluntarily and *unreasonably* exposed himself to a known danger, a departure from the rule enunciated in *Brown*. The result is that comparative principles will not be applied where

I would retain the defense of assumption of risk as set forth in 2 Restatement of Torts 2d § 402A, Comment (n) until pure comparative principles are applied in strict liability cases by this Court or the Montana legislature.

/s/ L. C. GULBRANDSON
Justice

Filed Apr 14 1983
Ethel M. Harrison

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 82-185

Tim A. Zahrte,
Petitioner,

v.

Sturm, Ruger & Co., Inc.,
Respondent.

ORDER

PER CURIAM:

Petitioner has filed herein a motion for partial reconsideration of decision and a brief in support thereof, which this Court will treat as a petition for rehearing. The Court has examined and considered the same.

IT IS ORDERED:

1. The last line on page 318 and the first line and that part of the second line on page 319 ending with the word "danger" appearing in 40 State Reporter (the first sentence of the first full paragraph on page five of the original opinion) is deleted, and the following sentence substituted therefor:

> "Unlike the common law defense of assumption of risk, the defense as applied in a strict liability case involves unreasonable exposure to the danger created by the defective product."

2. As so modified, the petition for rehearing is denied.

DATED this 14th day of April, 1983.

/s/ FRANK J. HASWELL
Chief Justice

/s/ FRANK B. MORRISON, JR.
/s/ DANIEL J. SHEA
/s/ JOHN CONWAY HARRISON
/s/ DANIEL J. WEBER
/s/ JOHN L. SHELBY
Justices

Filed Aug 22 1980
Lou Aleksich, Jr. Clerk
By Doreen F. Buch
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Tim A. Zahrte, *Plaintiff,* *vs.* Sturm, Ruger & Company, *Defendant.*	MEMORANDUM and ORDER No. CV-78-19-Bu

INTRODUCTION.

This is a strict liability action brought against Sturm Ruger & Company, Inc., a manufacturer of firearms. Trial of the action consumed three weeks. The jury, answering questions on a special verdict form, found that the plaintiff assumed the risk of his injury. Plaintiff now moves for new trial and judgment notwithstanding the verdict, raising three specifications of error. The issues were thoroughly briefed and argued, and carefully considered by the court. A review of those issues makes it clear that plaintiff's motions must be denied.

The firearm at issue was a Sturm Ruger .30 caliber western-style, single-action revolver. That revolver has six chamber spaces and was customarily carried fully loaded by plaintiff. On June 30, 1977, plaintiff was unloading gear from his employer's truck at his home in Missoula. The gun was included in that gear, and had been carried in the truck on the floor-boards for some two months prior to the accident. After picking up a number of items from the truck plaintiff carried them to the front stoop of his house. At that point he laid or

tossed the revolver down on the stoop (the evidence was conflicting on this point) whereupon it discharged, shooting the plaintiff in the hand, causing serious injury.

Plaintiff's basic contention was that the revolver had a defect which caused the accident. That alleged defect can best be described as a "false-safety" position wherein the trigger sear tip (the upper end of the trigger, hidden inside the gun) engages an over-hang on the hammer safety notch. Instead, a light blow to the hammer could cause an unintended discharge. (A full description of the revolver may be found in *Sturm, Ruger & Co., Inc. v. Day*, 594 P.2d 38, (Alaska 1979)). Plaintiff contended that the revolver was in the "false-safety" position at the time of the accident. Thus, he claimed that defendant was strictly liable for the resulting injuries.

With that as background, a review of plaintiff's arguments are undertaken below.

I. WHETHER THE COURT ERRED IN ITS INSTRUCTIONS ON COMPARATIVE FAULT.

In the course of this action the court faced several issues not yet considered by the Montana Supreme Court in products liability actions. One such issue was the apportionment of loss between an injured plaintiff and a manufacturer where the plaintiff's fault contributed in part to his injury.

Since the Montana Supreme Court had not addressed the issue, under *Erie v. Tompkins*, 304 U.S. 64 (1938), this court was compelled to decide the issue in light of state law and by having recourse to cases from other jurisdictions, other federal decisions, and any other source materials the state court might rely on if it were making the decision. See, 1A *Moore's Federal Practice*, Para. 0.309[2].

A review of the case law from other jurisdictions[1] convinced this court to adopt the judicial doctrine of "comparative fault" as that concept is explained in *Daly v. General Motors*, 144 Cal.Rptr. 380, 575 P.2d 1162 (1978). The principle of comparative fault was explained by the Alaska Supreme Court in *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976), as follows:

> The defendant is strictly liable for harm caused from his defective product, except that the damages shall be reduced in proportion to the plaintiff's contribution to his injury. *Id.* at 46.

The fundamental reason for adoption of comparative fault principles is that "it is fair to do so." *Daly v. General Motors*, 575 P.2d at 1172 (Cal. 1978). One commentator has explained the interaction of the strict products liability doctrine and comparative negligence principles which give rise to this doctrine as follows.

> Society requires consumers to meet a reasonable standard of conduct, or act at their peril. Conversely, manufacturers act at their peril in marketing unrea-

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[1] Jurisdictions applying comparative principles are Alaska, California, Florida, Idaho, Minnesota, Mississippi, New Hampshire, New Jersey, Oregon, Texas, Washington and Wisconsin. See *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Sun Valley Airlines, Inc. v. Avco—Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976); *Hagenbuch v. Snap-On Tools Corp.*, 339 F.Supp. 676 (D. N.H. 1972); *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.* 20 Cal.3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *West v. Caterpillar Tractor Co.*, 336 So.2d 80 (Fla. 1976); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978); *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 402 A.2d 140 (1979); *Bacelleri v. Hyster Co.*, 597 P.2d 351 (Or. 1978); *Hamilton v. Motor Coach Indus., Inc.*, 560 S.W.2d 571 (Tex. 1978); *Berry v. Coleman Systems Co.*, 596 P.2d 1365 (Wash. App. 1979); *Dipple v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

> sonably dangerous, defective products. A manufacturer's liability exposure is lessened "only to the extent that the trier finds that the victim's conduct contributed to his injury." In cases where injured consumers were not negligent, manufacturers are solely liable. Under comparative principles, therefore, the "incentive to avoid and correct product defects, remains ...."[2] (Citing *Daly*, 575 P.2d at 1169).

Having decided to adopt comparative fault principles, the court was urged by defendant to apply Montana's comparative negligence statute, section 27-1-702, MCA, 1979, which states:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Montana's comparative negligence statute has never, to this court's knowledge, been applied in a strict liability action. Indeed, the statute, by its terms, applies only to recovery of "damages *for negligence*." Section 27-1-702, MCA, (emphasis added). Strict liability actions are not grounded in negligence. Thus, statutory comparative negligence should have no place in a strict liability action. For a similar conclusion see *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978). If the Montana Legislature wishes to apply section 27-1-702, MCA, to strict liability actions, that is within their province. It is not within the province of this court.

In addition, there are strong policy reasons for not applying the comparative negligence statute in strict liability actions. That statute, section 27-1-702, MCA, creates an absolute defense if plaintiff is more than fifty percent negligent. Application of the statute could create a windfall for the

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[2] Carestia, Dominic P., "Comparative Principles and Products Liability in Montana." Article to be published in Vol. 41, No. 2, Montana Law Review, Summer 1980.

defendant by allowing a plaintiff to go uncompensated for injuries which are less than fifty percent attributable to the defendant. By contrast, pure comparative fault minimizes the potential for windfalls, as each party's fault in causing an accident reduces his recovery only to the degree of that fault.

Turning now to the arguments raised by plaintiff, we see first plaintiff's argument that the court, while purporting to adopt comparative fault principles, actually instructed the jury in terms of comparative negligence. Plaintiff, however, points to no specific erroneous instructions. The court rejected the comparative negligence statute as inapplicable and, as a review of the instructions reveals, made no mention of either plaintiff's or defendant's "negligence." Rather, the jury was told only that is must "consider whether *plaintiff's conduct* contributed to or was a proximate cause of his injury." Court's Instruction No. 1. (Emphasis added).[3]

In addition to his argument with regard to the court's adoption of comparative principles, plaintiff contends that the court's retention of the defense of assumption of risk as a complete bar to recovery is incompatible with those comparative principles. Plaintiff argues that if the comparative fault principles set forth in *Daly v. General Motors*, 575 P.2d 1162 (Cal. 1978), are adopted, they should be adopted in "pure" form as was done in *Daly*.

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[3] The full text of Court's Instruction No. 1 was as follows:

If you find that the revolver was in a defective condition, unreasonably dangerous, that the defect was the proximate cause of the plaintiff's injury, and that the defect existed at the time of manufacture, you must still consider whether plaintiff's conduct contributed to or was a proximate cause of his injury.

If you find that plaintiff's conduct did contribute to or was a proximate cause of his injury, then you must determine the relative percentages of fault attributable to defendant and to plaintiff.

Conceptually, the application of both comparative principles and assumption of risk as an absolute defense are not necessarily inconsistent. Assumption of risk is a difficult defense to establish, as it must be shown that plaintiff realized the existence of the defect or danger, subjectively appreciated the risk, and voluntarily did an act which exposed him to the defect or danger. *Brown v. North American Mfg. Co.*, 576 P.2d 711, 719 (Mont. 1978), citing *Dorsey v. Yoder*, 331 F.Supp. 753, 765 (E.D. Pa. 1971). Once that threshhold is crossed by the defense, plaintiff cannot recover.

Comparative principles, on the other hand, reduce the award of damages only in proportion to plaintiff's fault. As the jury was told "[i]f . . . plaintiff's conduct did contribute to or was a proximate cause of his injury, then you must determine the relative percentage of fault attributable to defendant and to plaintiff." Court's Instruction No. 1. See n. 3, *supra*. Because assumption of risk is a firmly established defense in a products liability action in Montana, *Brown v. North American Mfg., supra*, it was only plaintiff's conduct falling short of assumption of risk which could be considered in applying the comparative fault principles of *Daly v. General Motors*, 575 P.2d 1162 (Cal. 1978).

The Montana Supreme Court may ultimately absorb assumption of risk into a pure comparative fault scheme in strict product liability actions.[4] That approach is sound and well supported by authority.[5] Given the existing state of Montana law, however, this court did not err in applying both principles as it did. Plaintiff's arguments must therefore be rejected.

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[4] Such action was presaged by the Montana Supreme Court in a negligence action. *Kopischke v. First Continental Corp.*, 37 St. Rptr. 437 (1980).

[5] *Daly v. General Motors*, 575 P.2d 1162 (Cal. 1978). See also cases and commentary collected in Carestia, "Comparative Principles and Products Liability in Montana", *supra*, n. 2, at ns. 9 and 58.

II. WHETHER THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY CONCERNING ASSUMPTION OF RISK.

Under Montana law a jury must apply a subjective test in considering the defense of assumption of risk in a products liability action. *Brown v. North American Manufacturing,* ____ Mont. ____, 576 P.2d 711, 719 (1978). Plaintiff argues strenuously that the following instruction, given by the court, set forth an objective "reasonable man" standard and was, therefore, error.

> The defendant contends the plaintiff assumed the risk of injury from the danger which the plaintiff contends caused his injury. If you find each of the following propositions, the plaintiff cannot recover:
> 1. That a dangerous situation existed.
> 2. That the dangerous situation was obvious, or that the plaintiff knew of the dangerous situation.
> 3. That the plaintiff voluntarily exposed himself to the danger and was injured thereby.

An examination of the instruction does not support plaintiff's argument. The jury was told that if they found that "the dangerous situation was obvious, or that the plaintiff *knew* of the dangerous situation," then plaintiff could not recover. Plaintiff cannot take exception to the latter portion of the instruction. It plainly states a subjective standard.

The first part of the instruction presents a more difficult problem, for the jury may have considered the obvious nature of the danger in determining that plaintiff assumed the risk of his injury. The difficulty arises because the Montana Supreme Court, in *Brown v. North American Mfg.*, 576 P.2d 711 (1978), seems to have rejected what is known as the "open and obvious danger" rule. *Id.*, at 717. On that basis, plaintiff claims the giving of the instruction was error.

A closer examination of the *Brown* court's discussion of the open and obvious danger rule reveals that the position of the court is not so plain as plaintiff would have it. While the court

did state that it rejected the " 'open and obvious danger' or 'patent latent' rule as a bar to plaintiff's recovery under the theory of strict liability," *Brown*, 576 P.2d at 717, there are two important qualifications which are placed on the operation of the rule.

First, the *Brown* court's discussion of the "open and obvious danger" rule is directed not toward affirmative defenses such as assumption of the risk. Rather, the court stated that an obvious danger will not prevent plaintiff from establishing a *prima facie* case, i.e., that the product was in a defective condition unreasonably dangerous to the user. 576 P.2d at 717. Indeed, plaintiff submitted a critical portion of the *Brown* opinion as Plaintiff's Instruction No. 30, which was given by this court. That instruction, a direct quote from *Brown, Id.*, states:

> The fact that a danger is obvious does not prevent a finding the product [sic] is in a defective condition, unreasonably dangerous to the particular plaintiff. The obvious character of a defect or danger is but a factor to be considered in determining whether the plaintiff in fact assumed the risk.

Plaintiff cannot have it both ways. That is, he cannot on the one hand argue that telling the jury it could consider the obvious nature of a defect is error, and on the other hand submit a requested instruction telling the jury they could consider the obvious character of the danger as a factor in determining whether plaintiff assumed the risk. Indeed, the cumulative effect of the two instructions was to tell the jury that one of the factors they could consider in determining whether plaintiff assumed the risk of his injury was the obvious character of the defect or danger. This is permissible under Montana law as explained in *Brown*.

The second qualification concerns the subjective standard itself, the standard that must be satisfied to prove assumption of the risk. The *Brown* court recognized the difficulty defendants

face in trying to prove a plaintiff's subjective knowledge, stating that by positing a subjective standard, "we do not intend to impose a burden upon the defendant which is virtually impossible to discharge." 576 P.2d at 720. The court recognized that defendants will seldom, if ever, be able to "prove the subjective requisites of the assumption of risk defense by direct evidence." *Id.* Instead, a defendant may discharge its burden of proof "by circumstantial evidence." *Id.*

While the trial court must tread carefully in this area in terms of instructing the jury, it seems that one kind of circumstantial evidence includes an examination of the obvious character of the defect or danger. If a danger is obvious the jury may infer, from the circumstances and the plaintiff's actions with regard to the danger, his actual knowledge of that danger.

Plaintiff argues that his subjective knowledge of the defect or of the danger arising from that defect simply could not be established in this case; that he could not have and in fact did not have knowledge of the alleged defect, i.e., the "false safety" position. That may well be true. What plaintiff overlooks, however, is that the jury could easily have concluded that the "defect" had nothing to do with the accident.

There was sufficient evidence for the jury to find that the revolver was not, at the time of the accident or at any time during the two months previous to the accident, in the "false safety" position. At trial defendant demonstrated the unlikelihood that the hammer, once in the "false safety" position, would fall into the "full down" position. The hammer on the plaintiff's revolver was placed in the "false safety" position and the revolver was dropped a short distance onto its butt on the table. The sear tip fell from the "false safety" position into the safety notch. This, it appeared that the hammer was and had been at the time of the accident resting in the "full down" position, the firing pin in contact with a live round of ammunition in the chamber.

While Tim Zahrte testified that there was a gap between the hammer face and the frame, indicating the gun in the safety or "false safety" position, and that he was unaware of any danger from carrying a gun fully loaded, the jury could have rejected his testimony. Indeed, credible evidence indicated that the revolver was in the "full down" position at the time of the accident and had been in that position for the preceding two months. That being the case, the jury could have reasonably concluded that plaintiff was subjectively aware of the danger of the hammer being full down on a live round, and that he voluntarily proceeded to expose himself to that danger. Thus, plaintiff's lack of knowledge of the specific "defect" was irrelevant.

The instructions given in this case on assumption of risk were in conformity with Montana law. Defendant demonstrated plaintiff's subjective knowledge of the danger of the hammer being full down on a live round, thus discharging its burden of proof. Plaintiff's motion for new trial and judgment notwithstanding the verdict as to this issue are therefore denied.

III. WHETHER THE PREPARATION BY THE COURT OF THE SPECIAL VERDICT FORM WAS ERROR.

Defendants presented three proposed special verdict forms to the court, all of which were rejected for various reasons. Believing a special verdict form necessary to assist the jury, the

court prepared its own.[6] This form was partially patterned after that used in *Sun Valley Airlines, Inc. v. Avco—Lycoming Corp.*, 411 F.Supp. 598, n. 1 at 600, (D. Idaho 1976).

Plaintiff takes exception to the order in which the questions were presented. The argument, reduced to its basic terms, is that the verdict form first should have inquired as to the plaintiff's *prima facie* case, i.e., whether the product existed in a defective condition unreasonably dangerous to the user, etc. Instead, the form required the jury to consider the defenses first. Regardless of when the jury considered the question regarding plaintiff's assumption of the risk, the evidence allowed them to find that the defense had been established and that plaintiff could not recover. Thus, the order of the questions on the form was of no consequence.

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[6] SPECIAL VERDICT

In this case you will return a special verdict consisting of the following questions. You must unanimously agree to the answers to all of the following questions. Please answer each and every one of the following questions unless otherwise directed.

WE, THE JURY, UNANIMOUSLY ANSWER THE FOLLOWING QUESTIONS:

1. Did the plaintiff misuse the revolver in a manner not reasonably foreseeable to the manufacturer?

YES____ NO____

If your answer is "yes", proceed to answer Question No. 2. If your answer is "no", proceed to answer Question No. 3.

2. Was the above-mentioned misuse the sole proximate cause of the plaintiff's injury?

YES____ NO____

If your answer is "yes", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended. If your answer is "no", proceed to answer Question No. 3.

3. Did the plaintiff assume the risk of his injury?

YES____ NO____

If your answer is "yes", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended. If your answer is "no", proceed to answer Question No. 4.

4. Do you find that the revolver was defective because of defendant's design or failure to warn?

YES____ NO____

Footnote continued on following page.

Plaintiff argues further that unless the jury has first found a "defect", it cannot adequately consider whether the plaintiff subjectively knew of the danger presented by that defect. Yet, as was pointed out above, it was not necessary for plaintiff to know of a specific defect. Rather, it was sufficient that plaintiff knew and appreciated the dangerous condition that was presented—the hammer resting full down on a live round. Based on the evidence, the jury concluded that plaintiff had assumed the risk of his injury which came about as a result of that dangerous condition. The order of the questions on the special verdict form could not influence the jury's conclusion.

Footnote continued from preceding page.

If your answer is "no", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended. If your answer is "yes", proceed to answer Question No. 5.

5. If defective, was the design or failure to warn a proximate cause of plaintiff's injuries?

YES____ NO____

If your answer is "no", you need go no further. Date and sign this form and inform the bailiff your deliberations have ended. If your answer is "yes", proceed to answer Question No. 6.

6. Did plaintiffs conduct contribute to or was it a proximate cause of his injuries?

YES____ NO____

7. Taking the combined fault of the defendant and plaintiff that caused this accident as a total of 100%, what percentage of that fault was attributable to:

Tim A. Zahrte	____%
Sturm Ruger & Company	____%
Total =	100%

8. What is the full amount of damages which would compensate Tim A. Zahrte for his injuries and losses?

$_____

9. Do you find that punitive damages should be assessed against defendant?

YES____ NO____

10. If the answer to Question No. 9 is "yes", what amount do you assess?

$_____

DATED _____

_____

Foreperson

CONCLUSION.

Although this court was given little or no guidance on the complex legal issues presented prior to and during trial, and had to "divine" Montana law under *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), a review of the issues raised by plaintiff establishes no error. The comparative fault principles adopted from *Daly v. General Motors*, 20 Cal.3d 725, 144 Cal.Rptr. 380, 575 P.2d 1162 (1978), were correctly applied consistent with the established defense of assumption of risk. The jury was properly instructed on the assumption of risk defense. The special verdict form clarified and simplified the jury's task. For all of these reasons,

IT IS ORDERED and this does order that plaintiff's motions for new trial and judgment notwithstanding the verdict be and the same are hereby denied.

Filed Aug 16, 1983
Phillip B. Winberry
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James Shekell,
Plaintiff-Appellee,

vs.

Sturm, Ruger & Company, Inc.,
a Connecticut corporation,
Defendant-Appellant.

and

William B. Rugger,
Individually,
Defendant.

CA No. 81-3616
DC No. CV-80-70-GF
MEMORANDUM

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued October 5, 1982; Submitted April 29, 1983

Before: WALLACE, FARRIS, and POOLE, Circuit Judges.

Sturm, Ruger appeals from a jury verdict awarding Shekell $4,448 in compensatory damages and $100,000 in punitive damages for injuries suffered when a Sturm, Ruger revolver with an allegedly defective safety mechanism accidentally discharged. Sturm Ruger (1) challenges various jury instructions, (2) maintains that it was prejudiced by inflammatory statements of Shekell's counsel in his closing argument, (3) asserts that it was denied a fair trial because of the admission of irrelevant prejudicial evidence, and (4) contends that a magazine advertisement warning of the hazards of the Sturm, Ruger single-action revolver insulates it from liability, or at least from an assessment of punitive damages, as a matter of law. We reverse the jury verdict and order a new trial because of errors

in the district court's instructions. We also assess Sturm, Ruger's other arguments in order to assist the district court should the issues arise again upon retrial.

1. *The jury instructions.* The literal language of Shekell's Proposed Instruction 55 assumes the central issue in the case. The instruction provides in part: "A defendant such as Sturm, Ruger is strictly liable for harm caused from its defective product, regardless of the care exercised in its manufacture." This sentence could have conveyed an impression to the jury which tainted the entire charge. *See Northern Pacific Railway Co. v. Herman,* 478 F.2d 1167, 1171 (9th Cir. 1973).

Shekell's Proposed Instruction 16, adapted from the decision of the California Supreme Court in *Barker v. Lull Engineering Co.,* 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978), is an incorrect statement of Montana products liability law. Montana has adopted the rule of Restatement (second) of Torts § 402 A(1) which imposes liability on one who sells any product in a "defective condition unreasonably dangerous to the user or consumer." *See Brandenburger v. Toyota Motor Sales, U.S.A., Inc.,* 162 Mont. 506, 513-14, 513 P.2d 268, 272-73 (1973). The first of the alternative *Barker* tests, which requires a plaintiff to demonstrate only that a product is unreasonably dangerous, is unobjectionable. We have held that such a showing is all that is necessary in order to recover under Montana law. "It is not essential to strict liability that the product be defective in the sense that it was not properly manufactured." *Jackson v. Coast Paint and Lacquer Co.,* 499 F.2d 809, 811 (9th Cir. 1974). However, the second *Barker* test eliminates the requirement that plaintiff show that a product's design fails to meet consumer expectations. Following the rule in *Cronin v. J.B.E. Olson Corp.,* 8 Cal. 3d 121, 127-135, 104 Cal. Rptr. 433, 438-43, 501 P.2d 1153, 1158-63 (1972), this part of the *Barker* instruction focuses exclusively on the defect. But the Montana Supreme Court specifically rejected the holding in *Cronin* in favor of the Restatement formulation. *Stenberg v. Beatrice Foods Co.,* 176 Mont. 123, 129-30, 576 P.2d 725, 729 (1978).

In reviewing questions of state law we defer to the interpretation of a district judge sitting in diversity unless "clearly wrong." *Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982). In this case the giving of an instruction based upon a California doctrine explicitly repudiated by the Montana Supreme Court was "clearly wrong."

In its response to the certified questions in *Zahrte v. Sturm, Ruger & Co., Inc.*, No. 80-3400, slip op. (9th Cir. May 18, 1982), the Montana Supreme Court held that the Montana comparative fault statute, Mont. Code Ann. § 27-1-702, would govern the application of the assumption of risk defense in strict liability cases. *Zahrte v. Sturm, Ruger & Co. Inc.*, ____ Mont. ____, ____, 661 P.2d 17, 19 (1983). Interpreting *Brown v. North American Manufacturing Co.*, 176 Mont. 98, 576 P.2d 711 (1978), the Court also stated that a plaintiff's negligence is not a defense in strict liability actions. ____ Mont. at ____, 661 P.2d at 18. *Contra Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978). The district court erroneously gave both comparative negligence instructions, Shekell's Proposed Instruction 55 and Sturm, Ruger's Proposed Instruction 45, and an assumption of risk instruction, Sturm, Ruger's Proposed Instruction 44. The jury's response to Special Interrogatory No. 8 states only that it found Shekell to be eighty percent at fault. There is no indication whether the jury believed Shekell had assumed the risk, was contributorily negligent, or both. In addition, these instructions incorporated a pure comparative standard rather than the standard of the Montana statute, which bars recovery if a plaintiff is greater than fifty percent negligent. On retrial the district court should not instruct the jury on contributory negligence, and any assumption of risk charge must conform to the terms of the Montana comparative fault statute.

The court adopted Shekell's Proposed Instruction 52 on punitive damages. This instruction set forth a list of factors for the jury to consider in assessing punitive damages. The wealth

and pecuniary ability of the defendant, the public good and the restraint of others from wrongdoing, and the punishment of the offender are proper guides for the jury's discretion under Montana law. *See Ramsbacher v. Hohman*, 80 Mont. 480, 489, 261 P. 273, 277 (1927), *quoted in Butcher v. Petranek*, 181 Mont. 358, 362-63, 593 P.2d 743, 745-46 (1979). Since the cause will be retried we need not resolve whether the award of punitive damages was excessive.

2. *Improper statements during closing argument.* Sturm, Ruger contends that the jury was prejudiced by inappropriate remarks of Shekell's counsel equating the number of people injured by the revolver to the number of hostages held in Iran, claiming the number of people accidentally shot would be greater than the total killed by the Atlanta slayer, and making reference to the Rely tampon and Pinto automobile litigation. The statements were inflammatory. We do not decide whether they unduly influenced the jury's award of punitive damages but wise counsel would omit the references.

At oral argument Shekell's counsel suggested that it would be possible for a jury to award punitive damages without finding actual damages. To avoid any possible question on retrial, we set out Montana law on this question. A jury may not award exemplary damages if it does not find a compensable injury. However, the Montana Supreme Court has held: "Although the trier of fact, as a prerequisite for awarding exemplary damages, must find the claimant suffered actual damages, it is unnecessary that the trier of fact place a monetary value on the actual damages or make any *award* of actual damages." *Miller v. Fox*, 174 Mont. 504, 510, 571 P.2d 804, 808 (1977) (emphasis in original) (citing *Fauver v. Wilkoske*, 123 Mont. 228, 239, 211 P.2d 420, 425-26 (1949)); *see Harris v. American General Life Insurance Co.*, ____ Mont. ____, ____, 658 P.2d 1089, 1092-93 (1983); *Lauman v. Lee*, ____ Mont. ____, ____, 626 P.2d 830, 832-33 (1981).

3. *Admission of irrelevant and prejudicial evidence.* Sturm, Ruger claims it was error to allow testimonial evidence regarding the accident history of the Sturm, Ruger old-style single-

action revolver and an expert's description of its dangerous characteristics.

Under both Montana and federal products liability law, evidence of the occurrence of other accidents involving substantially the same circumstances as the case at issue is admissible to demonstrate the existence of a defect. *See Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 829 & n.9 (10th Cir.), *cert. denied*, ____ U.S. ____, 103 S. Ct. 137 (1982); *Brown v. North American Manufacturing Co.*, 176 Mont. 98, 106, 576 P.2d 711, 716 (1978). Sturm, Ruger argues that permitting the jury to consider evidence of other accidents was prejudicial because those accidents were not substantially similar to this case in which Shekell dropped a gun with the safety engaged. *See McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981). All the accidents Roy Jablonsky described occurred when an uncocked gun fired unexpectedly or when the position of the hammer was unknown. This provides the requisite identity of circumstances between the cause of Shekell's injury and the 160 reported accidents to render the testimony probative on the issue of whether the gun was unreasonably dangerous. The testimony was thus relevant within the meaning of Fed. R. Evid. 401. The trial court could have excluded the evidence if unfairness or confusion resulting from its admission substantially outweighed its probative value. The decision to exclude evidence under Rule 403 is within the discretion of the trial judge. *Liew v. Official Receiver and Liquidator*, 685 F.2d 1192, 1195 (9th Cir. 1982).

Sturm, Ruger's complaint that it was unfairly prejudiced by evidence of product characteristics not causally associated with Shekell's injury lacks merit. A description of the various ways in which the gun could accidentally fire is relevant if it promotes an understanding of how the firing mechanism works, aids in establishing whether the safety mechanism was defective, or assists the jury in comprehending how the gun could have discharged when Shekell dropped it. Evaluated in these terms, the evidence was relevant and the trial court's decision to

allow testimony about the revolver's dangerous characteristics was not an abuse of discretion.

Sturm, Ruger challenges the use of drop-test evidence at trial. It first urges that the Factoring Criteria adopted pursuant to the 1968 Gun Control Act were inadmissible because they were promulgated after Shekell's revolver was manufactured and were formulated to apply to a different category of firearms. *Vroman v. Sears, Roebuck & Co.*, 387 F.2d 732, 737-38 (6th Cir. 1967), which it cites in support of the first leg of its argument, is distinguishable because that case was a negligence action. In a strict liability suit, standards promulgated after manufacture are germane because the condition of the product, not the fault of the manufacturer, is at issue. *Cf. Caterpillar Tractor Co. v. Beck*, 624 P.2d 790, 793-94 (Alaska 1981) (permitting use of evidence of subsequent repairs or modifications in strict liability suit); *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 116-121, 117 Cal. Rptr. 812, 813-17, 528 P.2d 1148, 1149-53 (1974) (same); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 416, 470 P.2d 135, 139-40 (1970) (same). The purpose of Factoring Criteria to inhibit importation of cheap foreign firearms also does not disqualify the drop-test standard as a means of evaluating the safety of a domestically manufactured gun. *McKinnon*, 638 F.2d at 274-75, is not to the contrary. In that case the plaintiff offered OSHA safety regulations governing circular saws in the workplace as evidence on the issue of Skil's negligence. The court held the trial judge did not abuse his discretion in excluding the OSHA standards because "[t]he employment and consumer contexts are not fungible. . . . The law may not always require the same standard of care in the consumer context as it does in the employment context because each situation gives rise to its own peculiar set of problems." *Id.* at 275. Here, where the reliance of Sturm, Ruger on a particular standard of care is not at issue, the Treasury Department's drop-test standard, properly explained, may be a useful guide for evaluating the safety mechanism's performance. Some of the Factoring Criteria may

have been extraneous, but the trial court could have properly ruled that this information did not render the safety standard so misleading or irrelevant that its exclusion was required under Fed. R. Evid. 403. It follows that the results of the H. P. White drop tests performed on the Sturm, Ruger single-action revolver pursuant to the government standard in the Factoring Criteria should also be admissible. Finally, Sturm, Ruger objects to admitting a film of a drop test and an actual courtroom demonstration. As used, the film was relevant to depict the testing procedure and also to show how a gun could fire while the safety was engaged. The evidence was not introduced for the purpose of evaluating gun safety. However, the performance of an actual test in the courtroom which did not use Shekell's revolver may well have unfairly prejudiced Sturm, Ruger and confused the jury. The film served a valid informative function. The live demonstration using a different gun was for effect only and was probably more prejudicial than probative. Upon retrial the court should consider whether such a courtroom demonstration should be permitted in circumstances where the demonstration does not recreate the accident.

4. *The adequacy of Sturm, Ruger's warnings.* The court explained to the jury that in order for a product to be unreasonably dangerous it must have a propensity for causing physical harm beyond that contemplated by the ordinary consumer with ordinary knowledge common to the foreseeable class of users. Shekell's Proposed Instruction 5. In addition, the court instructed the jury that a failure to warn of a firearm's potential dangers in itself may constitute a design defect. Shekell's Proposed Instruction 57; *see Brown v. North American Manufacturing Co.*, 176 Mont. 98, 110, 576 P.2d at 711-19 (1978). Sturm, Ruger asks us to reverse the jury's explicit finding of failure to warn made in response to Special Interrogatory No. 4 and hold that its "Handle With Care" message insulates it from liability as a matter of law. Further, Sturm, Ruger contends that the publication of the advertisement precludes a jury from finding it guilty of oppression, fraud, or malice under the Montana exemplary damages statute. Mont. Code Ann. § 27-1-221.

The advertisement warns of the dangers of old-style single-action revolvers in general and informs readers that instruction manuals with appropriate warnings for the use of Sturm, Ruger firearms are available from Sturm, Ruger upon request. The notice was printed in the National Rifle Association monthly, *The American Rifleman*, as well as in other magazines popular among gun owners. While Shekell admits having received the November 1977 issue of the *The American Rifleman*, which contained Sturm, Ruger's message, he denies any knowledge that his weapon could fire in the safety position or that Sturm, Ruger recommended keeping an empty chamber under the firing pin.

The trial court gave Sturm, Ruger's Proposed Instruction 28, which stated that a manufacturer may reasonably assume that a warning will be read and heeded when reasonable means are provided to ensure that it is communicated. However, this instruction was given in conjunction with a charge that the manufacturer of a potentially dangerous product is obligated to warn of the dangers in its use with a degree of intensity commensurate with the potential danger. Shekell's Proposed Instruction 57. While an adequate warning may prevent an otherwise deceptively dangerous product from being considered defective or at least demonstrate conduct by a manufacturer inconsistent with a finding that punitive damages should be assessed, a jury could conclude that Sturm, Ruger's magazine advertisement was insufficient warning, given the revolver's inherent dangers. *See Dalton v. Toyota Motor Sales, Inc.*, 703 F.2d 137, 141 & n.2 (5th Cir. 1983). Such a finding could support an award of both compensatory and punitive damages.

REVERSED AND REMANDED.

Filed AUG 10 1983
Phillip B. Winberry
Clerk, U.S. Court of Appeals

Shekell v. Strum, Ruger & Co., No. 81-3616

POOLE, Circuit Judge, specially concurring:

I concur in the result and with Judge Farris' analysis of the issues. I write briefly to repeat my exception to the description of the standard of review which is to be applied to a district court's interpretation of the law of its state. The opinion refers to the standard as calling for *deference* unless "clearly wrong" (slip op. at 3), invoking as its authority *Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (1982) (upholding the district court's interpretation). That court, citing still earlier precedent, said that "[W]e accord *great deference*" to such determination and "disturb it only if it is 'clearly wrong.'" The *Airlift* court took its statement from *Power* v. *Union Pacific Railroad Co.*, 655 F.2d 1380, 1382 (1981) (reversing the district court's interpretation).

I do not doubt that many of our cases assert the existence of such a "clearly wrong" standard, but I strongly doubt that it exists, or that, as articulated, it is followed, or is other than subjectively applied, or is capable of being applied. It has two familiar generic bases. The first borrows from Rule 52(a) of the Federal Rules of Civil Procedure that "findings of *fact* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It is very sensible to recognize that credibility has many components, some depending on what is spoken and some on how. None of these first-hand advantages apply closely to determinations of state law. But it is very easy to slip into a formulary acceptance that since making findings of fact and conclusions of law are primary functions of trial judges, a like standard should apply to both functions. That is incorrect. The two functions are often temporarily related but are of altogether different genera.

The other basis lies in the theory that the trial judge works with these problems on a day-to-day basis and receives constant inputs of knowledge not available to reviewing courts. There is some, but less merit to this hypothesis. Appellate judges also experience a vast measure of knowledge concerning the law of the states in their circuit. However that may be, and whatever the soundness of that resulting input, every reviewing court accepts as unavoidable its responsibility to decide the law of the appeals before it. Appellate courts do not sit to hear facts *de novo*, and therefore, the Rule 52 standard for reviewing the trial court's determination of facts and selection of inferences is both sensible and essential. Not so with issues of law. Appellate courts resort to the same sources of law as do trial courts—the books. No amount of "deference," whether "great" or ordinary, will suffice to uphold nisi prius interpretation of law which a reviewing court knows or learns is either not sensible or merely incorrect.

To insist that we approve a legal interpretation unless it is "clearly wrong," when we know or find out better, ignores the processes of reason which we all follow. We apply our learning, new or old, to the problem and seek to determine not only what is the state of the law but whether its application in these premises makes both sense and justice. Essentially, this also is what the trial judge does, for he and we were lawyers first. I believe it is fanciful to obscure by a meaningless formula the truth that we review *de novo* determinations of law. The opinion in this case reversed the district judge, saying that he was "clearly wrong." I concur because I think the able author is "right."